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May 4, 2005

BY HAND AND ELECTRONIC MAIL

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

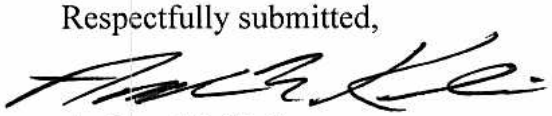
Re: D.T.E. 03-60, 03-59 and 04-73

Dear Secretary Cottrell:

Enclosed please find the original and five (5) copies of Covad Communications' Comments regarding Section 271 Tariffing in response to the DTE's Notice dated April 12, 2005.

Kindly acknowledge receipt of the foregoing by date stamping a copy of this cover letter and returning it to the waiting messenger. Please do not hesitate to contact me with any questions.

Respectfully submitted,



Andrew M. Klein
Counsel for Covad Communications Company

AMK/jas
Enclosure

cc: Anthony Hansel, Esq.
Active Party List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	D.T.E. 03-60
Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	D.T.E. 03-59
Investigation by the Department of Telecommunications and Energy on its own Motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts	D.T.E. 04-73

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Dated: May 4, 2005

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England, Inc d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communication Act of 1934, as amended, and the Triennial Review Order	D.T.E. 03-60, 03-59, 04-73

COMMENTS OF COVAD COMMUNICATIONS COMPANY

Covad Communications Company, by and through the undersigned counsel and in accordance with the Massachusetts Department of Telecommunications and Energy Memorandum issued April 12, 2005, respectfully submits the following comments in support of action by the DTE to enforce Massachusetts law and the federal Communications Act.

I. INTRODUCTION

The Department of Telecommunications and Energy should find that the services to be provided by Verizon in compliance with section 271 of the Act are clearly common carriage and must therefore be provided on just, reasonable and nondiscriminatory terms. In other words, Verizon's attempt to provide the network elements required by law in an unlawful, discriminatory and nontariffed fashion must be rejected.

Nine years after the Telecom Act and several years after Verizon *voluntarily* undertook to meet the requirements for interLATA entry, it is almost absurd that the DTE and competitive carriers continue to fight Verizon on this issue. Section 271 established a clear *quid pro quo*: the opening of the local market in exchange for long distance entry. This was not – as

Verizon would like to have it – a temporary opening, but rather a permanent and irreversible opening of the market to provide end users with competitive choice. Congress provided an unambiguous grant of authority to this and every other state commission to promote unbundling and require ongoing compliance with the law. Finally, the federal authority conferred is simply additive to the jurisdiction plainly conferred and requirements clearly established by Massachusetts law.

II. THE DTE MUST ENFORCE MASSACHUSETTS LAW AND REQUIRE THE TARIFFING OF SECTION 271 ELEMENTS

There can be no serious argument that the services to be provided by Verizon must be tariffed under Massachusetts law. Indeed, for all of its hyperbole, the Verizon filing barely touches upon the subject at issue – whether the services constitute common carriage within the meaning of Massachusetts General Laws[1] – despite the fact that the DTE had clearly framed the issue with the very specific questions posed in the Department letter dated March 8, 2005.

Verizon is undoubtedly a common carrier, and the services it offers common carriage. Common carriage has been defined to include the "transmission of intelligence within the commonwealth by . . . means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith."[2]

In Fiber Technologies Networks,[3] the Department favorably noted the common carriage test established by *National Ass'n of Regulatory Util. Comm'rs v. FCC*[4] and its progeny

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[1] MASS GEN. LAWS Ch. 159 (2005).

[2] MASS GEN. LAWS Ch. 159, § 12 (2005).

[3] D.T.E. 01-70, (Order issued August 20, 2004) (*Fiber Tech*).

for determining who should be deemed a "common carrier" under G.L. Ch. 159, § 19. "Under this two-part test, common carrier status turns on (1) whether the carrier offers telecommunications services indiscriminately to all potential users of the service, and (2) whether the carrier allows customers to transmit intelligence of their own design and choosing."[5] Since Verizon must provide, by its own admission, nondiscriminatory access to section 271 elements,[6] and will not be interfering with the transmission by carriers over those elements, this test is easily satisfied.

Section 19 of Massachusetts General Laws[7] specifically requires that "[e]very common carrier shall file with the department schedules showing all rates . . . classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth[.]" This unambiguous mandate leaves no room for argument that a common carrier (which Verizon undoubtedly is) could provide a service without filing an appropriate tariff. Furthermore, the statute goes on to specify the content of the tariff, instructing that the carrier "shall plainly print and keep [the tariff] open to public inspection," and include "all conditions and limitations, rules and regulations ***and forms of contracts or agreements*** in any manner affecting the same" and confers on the Department the right to prescribe the form and level of detail for such tariff.[8] Thus, even under an "individually-negotiated contracts"

(footnote continued from previous page)

[4] 525 F.2d 630 (D.C. Cir. 1976).

[5] *Fiber Tech,* at page 5, *citing* Wholesale Tariffing Memorandum at page 6 (*citing U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002)).

[6] *See, e.g.,* Response of Verizon to briefing questions, dated March 31, 2005 ("Verizon Response"), at page 6.

[7] MASS GEN. LAWS Ch. 159, § 19 (2005).

[8] *Id.*

scheme, Verizon would still be required, by law, to file such agreements and make the terms uniformly available.

Should Verizon fail to file a legally appropriate tariff, it would be prohibited from charging or collecting any rate for the service.[9] As a result, Verizon would be left with the Hobson's choice of providing the 271 services free of charge, or not providing the service at all and *ipso facto* falling immediately out of compliance with section 271 of the Act.

Finally, Verizon's proposal to provide section 271 elements on a "case-by-case basis"[10] is clearly violative of the Massachusetts statute's requirement that it "uniformly extend[] to all persons and corporations under like circumstances [terms] for the like, or substantially similar, service."[11] As further evidence of Verizon's disregard for the statute, the company advises the Department that it has failed to even identify "'classes of carriers' for the purpose of negotiating Section 271 commercial agreements[.]" Such an approach cannot stand in the face of the clear legal requirements that exist in Massachusetts law – not to mention the federal nondiscrimination prescriptions.[12]

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[9] *Id.*, providing that

> No common carrier shall, except as otherwise provided in this chapter, charge, demand, exact, receive or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the department and in effect at the time.

[10] Verizon Response at page 8.

[11] MASS GEN. LAWS Ch. 159, § 19 (2005).

[12] *See, e.g.,* 47 U.S.C. §§201, 202, 251, 271. Interestingly, Verizon acknowledges the existence of these requirements (at, e.g., page 6 and 7 of the Verizon Response) but makes not even the slightest attempt to indicate its compliance therewith. Furthermore, Verizon's representation that the FCC may "contemplate commercial agreements" for section 271 requirements (Verizon Response at page 7) is an irrelevancy in light of the requirements in the statute itself that section 271 elements be provided through interconnection agreements and the Act's prohibition on checklist modification and its preservation of state law requirements, all discussed in greater detail below.

III. THE DEPARTMENT'S ROLE AND STATE LAW AUTHORITY ARE PRESERVED BY THE ACT

The Communications Act explicitly preserves independent state law authority both generally, and with specific reference to unbundling, interconnection agreements, and section 271. The Act expressly prohibits the FCC, in a section appropriately entitled "Preservation of State Access Regulations," from interfering with "any regulation, order, or policy" of a state that "establishes access and interconnection obligations" and is consistent with the requirements of section 251.[13] Since section 251 of the Act requires access to elements, there is no question but that state-mandated access to elements would be consistent with the requirements of that section.

The Act also promotes and protects state authority at section 252(e)(3), specifically stating that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[14] The foregoing language shows a clear Congressional intent to preserve independent state authority to establish access to network elements to facilitate competition.

Verizon, however, continues to overstate its case, asserting in essence that there is no explicit role for the state commissions in the 271 process. Once again, the actual language of the Act is instructive – and dispositive – and contrary to Verizon's assertion. Section 271 requires that Verizon and its fellow Bell companies enter into "binding agreements . . . approved under section 252" (*i.e.,* by the state commission) that specify the terms and conditions for access

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[13] *Id.* at § 251(d)(3).

[14] 47 U.S.C. § 252(e)(3). The Covad/Verizon interconnection agreement, for example, specifically references section 271, and compliance by Verizon with ***all*** Applicable Law.

to the checklist items.[15] Contrast the foregoing statutory language with Verizon's remarkable assertion that "[n]othing in Section 271 requires Verizon MA to include Section 271 services in interconnection agreements filed with the Department under Section 252(a)(1)."

The fact that Verizon sought and obtained section 271 approval based on the existence of interconnection agreements under section 271 Track A means that the Commission has jurisdiction over the provision of checklist elements by virtue of its jurisdiction over interconnection agreements.[16] Moreover, since state commissions have jurisdiction over all issues included in interconnection agreements,[17] and the Covad/Verizon agreement specifically references Verizon's obligations under section 271, the Commission has, *ipso facto*, jurisdiction over section 271 and Verizon's compliance therewith.

The Act, of course, also requires that the FCC "consult with the State commission" to "verify the compliance" of the Bell with the checklist requirements.[18] Finally, the Act provides that the FCC "shall not approve" the application unless it finds that the Bell company has met either the interconnection agreement or SGAT requirement – which both require state commission approval.

Ultimately, the question must be asked, why Verizon is so fearful of tariffing its 271 offerings? Certainly, Verizon has an obligation to continue providing access to elements on the Competitive Checklist, so why not provide them under tariff? In the quintessential

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[15] 47 U.S.C. §271(c)(1)(A) (commonly referred to as "Track A"). Alternatively, of course, Verizon could have sought approval – from "the State commission" of an SGAT if "the State commission of such State certifies" that specific preconditions have been met. 47 U.S.C. §271 (c)(1)(B) (commonly referred to as "Track B"). *See also,* 47 U.S.C. §271 (c)(2)(A).

[16] 47 U.S.C. §271(c)(1)(A) and §252; Bell Atlantic New York 271 Order, at ¶ 275.

[17] *See*, Coserv Ltd. Liability Corp. v. Southwestern Bell Tel Co., 350 F.3d 482 (5th Cir. 2003).

[18] 47 U.S.C. §271 (d)(2)(B).

Shakespearean fashion,[19] Verizon's excessive protestations may be revealing and provide cause for concern.

Does Verizon seek to impose unjust or unreasonable terms on carriers, or engage in unlawful discrimination? Certainly, federal requirements have been and remain codified, so to speak, in state-level filings. If, for example, the section 251, 252 and 271 requirements are reflected in interconnection agreements submitted for state approval under section 252, and section 251 elements with section 252 pricing are contained in Massachusetts DTE tariffs, then there can be no justifiable opposition to also including section 271 elements in the DTE tariffs. Stated in the converse, there is no reason to circumvent the clear mandate of Massachusetts law requiring the filing of tariffs and schedules, since they have already been deemed applicable to other federal mandates.

The FCC Has Itself Acknowledged That The TRO Does Not Preempt State Law or Regulation

As the language of the TRO makes clear, the FCC has not attempted to preempt any state law or regulation governing competitor interconnection and access to network elements. It is noteworthy that even the FCC recognizes the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption.[20] The FCC further acknowledges that Congress expressly declined

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[19] Queen Gertrude, Hamlet (III, ii, 239).

[20] *See TRO* at para. 191:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

to preempt states in the field of telecommunications regulation.[21] Accordingly, the FCC has explicitly acknowledged that state commissions retain independent unbundling authority, including authority to require unbundled access to network elements.

IV. THE DEPARTMENT SHOULD EXERCISE ITS AUTHORITY TO PROMOTE COMPETITION IN THE PUBLIC INTEREST

The independent authority of the DTE to require continued access to network elements is undeniable.

Section 271 contains separate, independent commitments, that may be enforced by the DTE. Despite Verizon's attempts to turn back the clock and erase the lengthy 271 proceeding (D.T.E. 99-271) in which Verizon committed to checklist compliance in exchange for entry into the lucrative long distance market in the Commonwealth, the Department should not now ignore those commitments that, once undertaken, bear the force of law.

Section 271, in fact, explicitly prohibits the modification of the Checklist requirements, stating that the FCC "may not, by rule or otherwise, limit or extend the terms used in the competitive checklist[.]"[22] Thus, while Verizon attempts to now limit the application of the 271 checklist and by whom it may be enforced, the statute explicitly proscribes such efforts.

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[21] *Id.* at para. 192:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

[22] 47 U.S.C. §271(d)(4).

The FCC has acknowledged, in both the TRO and TRO Remand Order,[23] that section 271 creates obligations independent of section 251[24] – a ruling that was upheld by the U.S. Court of Appeals for the D.C. Circuit.[25] As a result, the FCC notes in the TRO Remand Order that the law on this topic is well settled. "*USTA II* upheld the *Triennial Review Order* in part, but remanded and vacated several components of it. The D.C. Circuit expressly upheld the Commission's...determinations regarding section 271 access [and] pricing . . . obligations[.]"[26]

Verizon readily admits that section 271 requires very specific access to network elements: "[s]ection 271 obligates Verizon MA to provide access to 'loop[s],' 'transport,' 'switching,' and 'databases and associated signaling,' independent of any obligation to provide

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[23] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, at para. 233 (rel. February 4, 2005) (hereinafter *TRO Remand*), *citing* 47 U.S.C. §252.

[24] In the words of the FCC (*TRO* at para. 655):

> [S]ection 271 places specific requirements on BOCs that were not listed in section 251 . . . . recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.

[25] *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("*USTA II*"), *citing* Triennial Order at para. 653-55:

> Section 271 of the Act sets conditions for Bell operating companies (the "BOCs") to enter the interLATA long distance market. These conditions include a "competitive checklist," § 271(c)(2)(B), specifying fourteen conditions that a requesting BOC must satisfy before it may provide interLATA service. Checklist item two requires BOCs to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 251(d)(1)," § 271(c)(2)(B)(ii), while checklist items four, five, six, and ten require the BOC to provide unbundled access to, respectively, local loops, local transport, local switching, and call-related databases, §§ 271(c)(2)(B)(iv)-(vi),(x). The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market.

[26] *TRO Remand* at para. 12.

unbundled network elements ("UNEs") under Section 251(c)(3), 47 U.S.C. 271(c)(2)(B)(iv)-(vi), (x)."[27] Even Verizon recognizes that while one item on the 271 Competitive Checklist makes reference to section 251(c)(3), the remainder of the specific unbundling obligations are standalone requirements.[28] Unfortunately for Verizon, that is where the reasonableness of its pleading comes to an end, citing dicta as substantive holdings[29] and reading exclusivity into statutes where none in fact exists.[30]

Some states have already recognized the value in ordering ongoing Bell compliance with section 271. The Maine Public Utilities Commission has, for example, ordered Verizon to comply with its 271 obligations by providing continued access to network elements. The Maine Commission notes that it retains "an independent role in determining whether those

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[27] Verizon Response, at page 2 (*citing also* the Triennial Review Order at paras. 653-59).

[28] Compare §271(c)(2)(B)(ii) with 271(c)(2)(B)(iv), (v) and (vi). *See also,* Triennial Order, at ¶ 654 (internal footnotes omitted):

> Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and work of a statute.

[29] *See* Verizon Response at page 2, *citing* a LATA boundary modification order as dispositive on the question of 271 oversight.

[30] *See* Verizon Response at page 2, where Verizon manufactures Congressional intent from a simple FCC reference noting that §271(d)(6) empowers the FCC to ensure continued compliance – with no express or implied prohibition on the very type of ongoing state oversight that Verizon has acknowledged on numerous occasions (*See, e.g.,* Verizon New England Inc. d/b/a Verizon Massachusetts Performance Assurance Plan, D.T.E. 03-50 and D.T.E. 99-271).

[271] obligations have been met,"[31] and that, until new rates are set, "Verizon must continue to provide all section 271 UNEs at existing TELRIC rates."[32]

Given the unambiguous nature of the checklist requirements, the Department should take this opportunity to protect competition and promote the public interest. As Verizon notes, "[s]ection 271 obligates Verizon MA to provide access to [*inter alia*, loops and transport] independent of any obligation to provide unbundled network elements ("UNEs") under Section 251(c)(3)."[33] Those obligations should be clarified by the Department.

Since Verizon has taken the position that line sharing is not a section 271 element, the Department should also clarify that line sharing is indeed a section 271 element that should also be tariffed. Verizon's independent statutory obligation to provide competitors with unbundled access to loop transmission includes access to the HFPL, a form of loop transmission that Verizon itself utilizes to provide DSL services separately from narrowband voice services to its own customers, as the FCC has repeatedly held. Numerous state commissions have reiterated the FCC's conclusion and, together, provide compelling precedent that the Department should prohibit Verizon from disregarding its legal obligations under section 271 by refusing to provide such access under section 271.

Verizon's obligation to provide access to line sharing is grounded in two irrefutable legal facts: (1) Line sharing is a checklist item 4 loop transmission facility; and (2)

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[31] *See, Verizon-Maine: Proposed Schedules, Terms, Conditions, and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, Procedural Order, at page 1 (March 3, 2005) (*citing* Order dated September 3, 2004).

[32] *Id.*

[33] Verizon Response, at page 2 (*citing* 47 U.S.C. 271(c)(2)(B) and the Triennial Review Order at paras. 653-59).

Regional Bell Operating Companies ("RBOCs") like Verizon, offering long distance services pursuant to section 271 authority, have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under section 251. To date, Verizon has never disputed the second of these facts — that if line sharing falls under checklist item 4, then Verizon has the obligation to provide it irrespective of section 251 determinations. Instead, Verizon's arguments are generally directed at clouding the legal fact that line sharing is a checklist item 4 loop transmission facility. Each of Verizon's arguments misconstrues the law or is otherwise incorrect.

There can be no legitimate debate that line sharing is a checklist item 4 loop transmission facility. In the Massachusetts 271 Order, the FCC explicitly held:

> On December 9, 1999 the Commission released the Line Sharing Order that, among other things, defined the high-frequency portion of local loops as a UNE (recommending that "Verizon must continue to offer line sharing pursuant to Checklist Item No. 4 of section 271"). More recently the Maine Commission held that Verizon must include those UNEs that it is required to provide pursuant to section 271 of the Act at TELRIC rates in its UNE Wholesale Tariff. With regard to line sharing, the Commission held that it had the authority to order line sharing under that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, **checklist items 2 and 4** of section 271.[34]

The FCC placed line sharing in both checklist items 2 and 4 because at the time of the *Massachusetts 271 Order*, line sharing was required to be unbundled pursuant to section 251(c)(3). As a consequence, line sharing, along with the other section 251(c)(3) UNEs, was included in checklist item 2 – which requires access to all section 251(c)(3) UNEs. Line sharing

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[34] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 164 (hereinafter "*Massachusetts 271 Order*").

was also included in the specific checklist item under which it falls, checklist item 4.[35] While the determination in the TRO that line sharing was no longer a section 251(c)(3) UNE did remove line sharing from checklist item 2, it did not remove line sharing from checklist item 4.[36]

It was precisely to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4-6 and 10 that the FCC engaged in the TRO analysis at paragraphs 649-667.[37] The FCC's interpretation of section 271(c)(2)(B) reconciles the overlapping access requirement contained in checklist item 2 with the same access requirements contained in checklist items 4-6 and 10.[38]

Importantly, the FCC's statement in the *Massachusetts 271 Order* was not an anomaly: in every FCC 271 Order granting Verizon long distance authority since the advent of

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[35] 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi) and (x); see also, TRO at 654. Moreover, before it was in its interest to do otherwise, Verizon itself placed line sharing and line splitting in its own section 271 briefs to the states and to the FCC under checklist item 4, removing any doubt that line sharing is a section 271(c)(2)(B)(iv) (checklist item 4) network element.

[36] *TRO* at ¶ 652 ("[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain [checklist 4, 5, 6 and 10] network elements that are no longer subject to unbundling under section 251 ...").

[37] *Id.* at ¶ 651 ("In the Triennial Review NPRM, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2).").

[38] *TRO* at ¶ 659:

> In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

line sharing, the FCC placed line sharing in checklist item 4.[39] In fact, even after its decision to eliminate HFPL access in the TRO under section 251, the FCC continued to look at the non-discriminatory availability of line sharing as an integral component of its checklist item 4 analysis in section 271 proceedings.[40] The FCC required SBC, for example, to provide proof of non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item 4 of section 271, after the TRO eliminated line sharing as a section 251 element.

Where state commissions have addressed the question, they have agreed that line sharing falls under checklist item 4, and that Bell Operating Companies subject to section 271 must provide access to it, or that it may be ordered under state law.[41]

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[39] *See* Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin, WC Docket No. 03-167, Memorandum Opinion and Order, FCC 03-243, ¶¶ 142-145 (2003); see Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota, WC Docket No. 03-90, Memorandum Opinion and Order, FCC 03-142 at ¶ 53, and App. C, ¶¶ 50-51 (2003); see Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan, WC Docket No. 03-138, Memorandum Opinion and Order, FCC 03-228 at ¶¶ 133-143 (2003). In Michigan, the FCC required SBC, the BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item #4 of section 271 after the TRO eliminated line sharing as a UNE. Even in the Bell Atlantic 271 Order, which was reviewed prior to the advent of line sharing, the FCC scrutinized Verizon's provision of access to loops for DSL under checklist item 4. *See*, e.g., Bell Atlantic 271 Order at ¶¶ 268, 271, 275 and 316-336.

[40] *See* Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin, WC Docket No. 03-167, Memorandum Opinion and Order FCC 03-243, ¶¶ 142-145 (2003); see Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota, WC Docket No. 03-90, Memorandum Opinion and Order, FCC 03-142 at ¶ 53, and App. C, ¶¶ 50-51 (2003); see Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan, WC Docket No. 03-138, Memorandum Opinion and Order, FCC 03-228 at ¶¶ 133-143 (2003).

[41] In Maine: *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Procedural Order, Docket No. 2002-682 (Aug. 19, 2004). *See also*, Examiner's Report, Docket No. 2002-682 at 28 (July 23, 2004) *(citing Application of Verizon New England, Inc. et. al. for Authorization to Provide In-Region,*

(footnote continued to next page)

Verizon has, nonetheless, attempted to avoid its obligations under section 271 based on an improper, hyper-technical reading of checklist item 4, which ignores the FCC's clarifying definition. Verizon has argued, for example, that checklist item 4, which requires "access to the local loop transmission from the central office to the customer's premises, unbundled from local switching or other services," only requires Verizon to provide a loop unbundled from switching and not some portion of the capacity of the loop.[42] Verizon's position, however, ignores the unmistakable concurrence of the relevant definitions:

- Section 271(c)(2)(B)(iv) of the Act (item 4 on the competitive checklist), requires local loop transmission from the central office to the customer's premises;
- The FCC defined the "loop," for purposes of checklist item 4, as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises;"[43]

(footnote continued from previous page)
InterLATA Services in Massachusetts, Memorandum Opinion and Order at ¶163 (Apr. 16, state law. A decision to adopt the Examiner's recommendation continuing line sharing under 271 is pending. *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20)* and Resold Service (PUC 21), Order –Part II, Docket No, 2002-682 (Sept. 3, 2004).

In Pennsylvania: Opinion and Order, *Covad Communications Company v. Verizon Pennsylvania Inc.*, Pennsylvania Public Utility Commission Docket No. R-00038871C0001, issued July 8, 2004, pp. 19-20 (finding that "it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop. . . . line sharing was a section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing section 271 obligations") (hereinafter, "*PA Opinion and Order*").

[42] This argument had been included in an August 9, 2004, letter from Verizon to Covad.

[43] *See*, e.g., Bell Atlantic New York 271 Order, ¶ 268 (citing Local Competition First Report and Order, 11 FCC Rcd 15499, 15691); In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, the Ohio Bell Telephone

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- In the TRO, the FCC defined the High Frequency Portion of the Loop ("HFPL"), used to provide line sharing, as a "complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises."[44]

Clearly, the above definitions refer to the same item. Since the high frequency portion of the loop is simply "a complete transmission path" over the loop, it constitutes a form of "loop transmission facility" or "local loop transmission" under either the statutory or FCC definition of a checklist item 4 element.[45] Indeed, Verizon routinely uses the HFPL transmission channel to provide xDSL services.[46] The FCC and Verizon always considered the HFPL under checklist item 4 — local loop transmission facilities — precisely because the HFPL is a type of loop transmission facility. Line sharing must therefore be made available under section 271(c)(2)(B)(iv).

As with line sharing, Verizon must continue to provide access to high capacity loops and transport under section 271, to the extent their availability as 251(c)(3) UNEs may be limited. In other words, to the extent a loop type has been removed in its entirety, or is deemed

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Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, Released October 15, 2003 at F-26 (explaining the legal background of checklist item 4, including line sharing) ("SBC Order").

[44] TRO at ¶ 268.

[45] *Id.*

[46] In other words, Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services over the high frequency portion of their local loop (HFPL).

unavailable to particular locations, it must remain available as a section 271(c)(2)(B)(iv) element for the reasons set forth above. Similarly, transport must likewise be made available under section 271(c)(2)(B)(v) wherever it is determined to be unavailable as a UNE.

Thus, in sum, as long as Verizon continues to sell long distance service using section 271 authority, it must continue to provide non-discriminatory access to all network elements under checklist items 4, 5, 6 and 10 – irrespective of their status under section 251.

V. CONCLUSION

In light of the foregoing, the Department of Telecommunications and Energy should require the tariffing of the 271 elements as common carriage within the meaning of the Massachusetts General Laws, and utilize its authority to clarify that all forms of loop transmission and transport be so tariffed, and take such other and further action as the Department may deem to be just and proper.

Respectfully submitted,

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